STATE OF MICHIGAN
IN THE SUPREME COURT

COUNTY ROAD ASSOCIATION OF MICHIGAN, a Michigan nonprofit corporation, and CHIPPEWA COUNTY ROAD COMMISSION, a public body corporate,

Plaintiffs-Appellants,

v

JOHN M. ENGLER, GOVERNOR OF THE STATE OF MICHIGAN; GREG ROSINE, DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION; MICHIGAN DEPARTMENT OF TRANSPORTATION; DUANE E. BERGER, DIRECTOR OF THE MICHIGAN DEPARTMENT OF MANAGEMENT & BUDGET; MICHIGAN DEPARTMENT OF MANAGEMENT & BUDGET; DONALD H. GILMORE, STATE BUDGET DIRECTOR; DOUGLAS B. ROBERTS, STATE TREASURER; MICHIGAN DEPARTMENT OF TREASURY; CANDICE S. MILLER, SECRETARY OF STATE; and MICHIGAN DEPARTMENT OF STATE,

Defendants-Appellees,

MICHIGAN PUBLIC TRANSIT ASSOCIATION; ANN ARBOR TRANSPORTATION AUTHORITY; THE CAPITAL AREA TRANSPORTATION AUTHORITY; and SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Intervening Plaintiffs-Appellants.

and

MICHIGAN MUNICIPAL LEAGUE,

Amicus Curiae.

Supreme Court No. 125665

Court of Appeals Nos. 45767

Lower Court File No. 02-308-CZ

Hon. William E. Collette

BRIEF OF AMICI CURIAE
MICHIGAN ROAD BUILDERS ASSOCIATION
AND
ASSOCIATED UNDERGROUND CONTRACTORS

Dated: October 25, 2004

Michael C. Levine (P16613) Ryan K. Kauffman (P65357) Fraser Trebilcock Davis & Dunlap PC Attorneys for Plaintiffs-Appellees 124 West Allegan, Suite 1000 Lansing, MI 48933 (517) 482-5800	Deborah Ann Devine (P29363) John F. Szczubelek (P47902) Assistant Attorneys Generals for other Defendants – State Affairs Division P.O. Box 30212 Lansing, MI 48909 (517) 373-1162
John D. Pirich (P23204) Angela M. Brown (P56277) Honigman Miller Schwartz and Cohn LLP Attorneys for Intervenors Michigan Public Transit Assn., Ann Arbor Transportation Authority and The Capital Area Transportation Authority 222 North Washington Square, Suite 400 Lansing, MI 48933-1800 (517) 377-0710	Patrick F. Isom (P15357) Attorney for Michigan Dept. of Treasury and Greg Rosine 425 West Ottawa Street Lansing, MI 48913 (517) 373-1470
Russell E. Prins (P19110) Attorney for Michigan Dept. of Treasury and Douglas B. Roberts 430 West Allegan, 1st Floor Lansing, MI 48922 (517) 373-3203	David M. Lick (P16656) Jeffrey W. Bracken (P25648) Ronald W. Bloomberg (P30011) Loomis, Ewert, Parsley, Davis & Gotting, P.C. Attorneys for Amici Curiae Michigan Road Builders Association and Associated Underground Contractors 232 South Capitol Avenue, Suite 1000 Lansing, MI 48933 (517) 482-2400
Mary Massaron Ross (P43885) Plunkett & Cooney, P.C. Attorneys for Amicus Curiae Michigan Municipal League 535 Griswold, Suite 2400 Detroit, MI 48226 (313) 965-4801	

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STATEMENT OF QUESTION INVOLVED

1. ARE REVENUES FROM THE SALES TAX ON MOTOR VEHICLES AND MOTOR VEHICLE FUEL, PARTS AND ACCESSORIES, WHICH ARE ALLOCATED EXCLUSIVELY FOR COMPREHENSIVE TRANSPORTATION PURPOSES, PROTECTED BY CONST 1963, ART 9, §9, FROM THE GOVERNOR'S AUTHORITY UNDER CONST 1963, ART 5, §20, TO REDUCE EXPENDITURES?

   CRAM and the Chippewa County Road Commission answer "yes."

   The State Defendants answer "no."

   Intervening Parties, the Michigan Public Transit Association, Ann Arbor Transportation Authority, and Capital Area Transportation Authority answer "yes."

   Amicus Curiae Michigan Municipal League answers "yes."

   The Court of Appeals answers "no."

   The trial court would presumably answer "yes."

   Amici Curiae Michigan Road Builders Association and Associated Underground Contractors answer "yes."

STATEMENT IDENTIFYING ORDER APPEALED FROM

All parties agree that the order appealed from is the January 13, 2004 Opinion of the Court of Appeals in this matter. In addition, *amici curiae* note that the January 13, 2004 Opinion, page 9, not only reversed the Circuit Court's order of preliminary injunction but also directed "the trial court to enter a judgment in favor of defendants on the merits." Thus, the Court of Appeals has effectively issued a final decision on the merits of the legal issue involved in the proceeding below.

I. GROUNDS FOR APPLICATION FOR LEAVE TO APPEAL

This case clearly satisfies the grounds set forth in MCR 7.302(B) for the granting of leave to appeal. The case is brought by municipal bodies against the Governor and various other state officials.

The issue involved is of significant public interest. The issue involved affects, directly or indirectly: (i) governmental entities at both the state and local levels; (ii) the public using the transportation infrastructure in Michigan; (iii) the financial community investing in transportation projects in Michigan; and (iv) the significant portion of Michigan industry and businesses (and their employees) involved in the manufacture, construction and maintenance of automobiles, trucks, highways, bridges, roads and public transportation. The amounts involved may vary from year-to-year, but were, and can continue to be, in the magnitude of tens of millions of dollars per year. This issue involved the dedication of motor vehicle tax revenues exclusively to transportation purposes, has for over 70 years been, and continues to be, of significant public interest. This significance is highlighted by the fact that twice the voters in Michigan have ratified specific proposals to add or amend constitutional provisions governing the use of such revenues. It is also reflected in the number of persons and entities representing various public and private entities that have participated as intervenors and/or amicus curiae in the proceedings at the trial court and the Court of Appeals.

The legal issue involved, the proper interpretation and application of, and the interplay between, Article 9, §9 and Article 5, §20 of the state Constitution, is of major significance to the state's jurisprudence.

As reflected in this Court's Order of September 30, 2004, this case satisfies the grounds for granting leave to appeal.

II. INTRODUCTION

Amicus curiae Michigan Road Builders Association ("MRBA") is a pre-eminent trade association which represents the interests of construction companies, support service firms and suppliers. Since 1928, MRBA has been "The Voice of Michigan's Road and Bridge Building Industry." Today, MRBA represents the contractors responsible for nearly 90 percent of all Michigan Department of Transportation work, in addition to the vast majority of county and municipal projects.

Amicus curiae Associated Underground Contractors ("AUC") is a pre-eminent trade association representing the interests of over 550 members statewide. When AUC was founded 55 years ago, the majority of its members were underground contractors. Since then, AUC has expanded to include many other areas in Michigan's heavy construction industry such as road/bridge building, electrical contracting, painting, plus more, and thus became Michigan's heavy construction association.

Both MRBA and AUC were granted leave to intervene in the Circuit Court proceeding that underlies the instant appeal. By order dated March 28, 2003, the Court of Appeals granted MRBA's and AUC's motion to file an *amicus curiae* brief in these appeals.

As *amici curiae*, MRBA and AUC are not seeking to expand any of the issues raised by the parties, present any new evidence on issues of fact, or challenge the Circuit Court's findings of fact. Rather, as *amici curiae*, MRBA and AUC seek primarily to provide the Court with additional legal authority, material and argument not presented by Appellants, Appellees or Intervenors, which material *amici curiae* conclude is helpful to the correct understanding and resolution of the primary substantive issues of jurisprudential and public significance raised in these appeals. In the Court of Appeals, the A*mici Curiae* Brief of MRBA and AUC sought to

provide the Court of Appeals with material information, including: (i) applicable principles of constitutional construction; (ii) the legislative history of the taxes on motor vehicle fuels and the use of revenues derived therefrom; (iii) the history and purpose of Const 1963, art 9, § 9 and its predecessor Const 1908, art 10, § 22; and (iv) the background and history of the 1978 amendment to Const 1963, art 9 § 9, including its role in the comprehensive transportation program adopted that year. As much of this information has been addressed by the filings of the parties before this Court, it will not be repeated herein.

Rather, *amici curiae* MRBA and AUC will address in this brief specific errors of law in the legal principles: (i) argued by Appellees; and/or (ii) applied by the Court of Appeals and the reasoning underlying its decision. In doing so, *amici curiae* will not repeat the authority cited by and arguments presented by Appellants and other *amicus curiae*, but incorporate and adopt such arguments by reference.

III. ARGUMENT

1. REVENUES FROM THE SALES TAX ON MOTOR VEHICLES AND MOTOR VEHICLE FUEL, PARTS AND ACCESSORIES, WHICH THE LEGISLATURE HAS ALLOCATED, PURSUANT TO CONST 1963, ART 9, §9 TO BE USED EXCLUSIVELY FOR COMPREHENSIVE TRANSPORTATION PURPOSES CANNOT BE TRANSFERRED BY THE GOVERNOR, PURSUANT TO CONST 1963, ART 5, §20 TO THE GENERAL FUND.

The substantive issue decided by the Court of Appeals below is whether revenues from the general sales tax on motor vehicle fuel, motor vehicles and motor vehicle parts and accessories ("general sales tax") which the Legislature allocates to the Comprehensive Transportation Fund ("CTF") are protected by Const 1963, art 9, §9, from reallocation by the Governor to the general fund pursuant to Const 1963, art 5, §20. In addition to dedicating revenues from specific taxes on motor vehicle and aviation fuel to transportation purposes, Const

1963, art 9, §9, as amended in 1978, provides:

> . . . and not more than 25 percent of the general sales taxes, imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles, after the payment of necessary collection expenses; shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law.

First, as explained in Appellants' Brief, pages 20-26, both: (i) the plain language of this provision, especially when read in light of the language of the entire sentence of which it is a part, the remainder of §9 and similar constitutional provisions; and (ii) the purpose and history of §9, plainly demonstrate that the revenues from these taxes are to be used for comprehensive transportation purposes and are not subject to transfer by the governor to the general fund.

Second, all parties to this case have argued that this language of §9 is plain and not ambiguous. Initially, the Court of Appeals' opinion, pages 4-5, appears to have agreed, stating:

> In interpreting a provision of the Michigan Constitution, words of that provision "must be given their ordinary meanings." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 155-156; 665 NW2d 452 (2003). **According to the plain language of art 9, §9**, no more than twenty-five percent of the general sales taxes "shall" be "exclusively" used for comprehensive transportation purposes, while the remaining balance goes to the state general fund. It is well established that the use of the word "shall" rather than "may" indicates a mandatory, rather than discretionary, action. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 318; 596 NW2d 591 (1999). The word "exclusive" means "limited to that which is designated." *Random House Webster's College Dictionary* (1997). **Thus, this part of the language of art 9, §9 provides that once the Legislature apportions a certain percentage not exceeding twenty-five percent of the general sales tax to the CTF, the funds shall be used exclusively for comprehensive transportation services.** (Emphasis added)

Despite this statement of what Const 1963, art 9, §9 plainly provides, the Court of Appeals next: (i) states that the language is ambiguous; and (ii) resolves this ambiguity by concluding that since the Legislature might decide not to allocate any portion of the revenues from the general

sales tax to the CTF, any revenues that the Legislature does so allocate are not protected by Const 1963, art 9, §9 from reallocation by the Governor to the general fund. The Court stated:

> We conclude that the language of art 9, §9 is ambiguous. It unequivocally exempts *all* general sales taxes from the restrictions imposed on specific taxes but then simultaneously subjects *up to twenty-five percent* of general sales taxes to the very same restrictions. (Opinion, page 5)

As discussed below, this reasoning and conclusion are clearly erroneous.

A provision is "ambiguous" when it is susceptible to more than one meaning. *See generally, City of Lansing v Twp of Lansing*, 356 Mich 641, 97 NW2d 804 (1959). The provisions of §9 are not subject to more than one interpretation in this regard. Furthermore, contrary to the Court of Appeals statements, §9 does not subject general sales tax revenues to the very same restrictions to which it subjects specific tax revenues. Rather as explained below, there are differences in the restrictions. But those differences do not make any of the provisions of §9 ambiguous.

As the Court of Appeals correctly noted, the first two sentences of §9, and the first two clauses of the third sentence of §9 exempt general sales tax revenues from the restrictions imposed on specific taxes revenues. Those restrictions on specific tax revenues include that: (i) 100% of the revenues from specific taxes on motor vehicle fuel must be used for transportation purposes as set forth in §9; (ii) at least 90% of such specific tax revenues must be used for highway purposes; (iii) the balance, if any, must be used for comprehensive transportation purposes; and (iv) 100% of the revenues from specific taxes on aviation fuel must be used for comprehensive transportation purposes.

The Court then stated that §9 subjects "*up to twenty-five percent* of the general sales tax revenues to the very same restrictions." This is clearly erroneous. For example, the third clause

of the third sentence of §9 does not, itself, require that 100% of 25% of the general sales tax revenues be used exclusively for transportation purposes. Nor does it require that at least 90% of such revenues must be used exclusively for highway purposes. Section 9 does not limit the amount of such general sales tax revenues that may be used for comprehensive transportation purposes to ten percent. In contrast to the requirement that 100% of revenue from specific taxes on aviation fuel be used for comprehensive transportation purposes, §9 does not require, or even permit, 100% of the general sales tax revenues to be used for such purposes. Thus, §9 does not subject general sales tax revenues to the very same restrictions it applies to specific taxes.

Rather, §9 plainly subjects general sales tax revenues to restrictions that are different than those applicable to specific taxes. For example, the limitation of 25% of general sales tax revenues that can be used for comprehensive transportation purposes is greater than the percentage (*i.e.*, 10%) of revenues from specific taxes on motor vehicle fuel that can be used for comprehensive transportation purposes. The 25% limitation is less than the percentage (*i.e.*, 100%) of revenues from the specific tax on aviation fuel that can (and must) be used for comprehensive transportation purposes.

That §9 plainly: (i) directs various dispositions of specific tax revenues; (ii) exempts general sales tax revenues from such provisions; and (iii) directs a similar (but not exactly the same) disposition of general sales tax revenues, does not create any ambiguity in §9. These provisions are not subject to more than one (let alone 'alternative') interpretation. They are not ambiguous in this regard. The Court of Appeals erred in so finding. As noted earlier in the Court of Appeals' opinion, the language of §9 is plain. Such constitutional provisions should be enforced as written and commonly understood.

Third, not only did the Court of Appeals err in finding §9 ambiguous in this regard, but it

also committed serious errors in applying the rules of construction cited by it. Quoting from this Court's decision in *Traverse City School District v Attorney General*, 384 Mich 290, 406; 185 NW2d 9 (1971), the Court of Appeals stated: "[W]herever possible an interpretation that does not create constitutional invalidity is preferred to one that does." The Court of Appeals does not elaborate how it applied this rule of construction in this case. In the absence of any such explanation, the only possible conclusion is that the Court thought that if §9 could be interpreted so as not to make the Governor's actions unconstitutional, such interpretation should be adopted. If that is, in fact, how the Court applied this rule of construction, it was a serious error. See generally, *Lockwood v Sims*, 357 Mich 517, 566-570; 98 NW2d 753 (1959). The provisions of the Constitution are to be interpreted to effectuate, rather than defeat, their purpose. They are not to be interpreted in a restrictive or limited manner that detracts from their plain meaning as commonly understood so to avoid invalidating legislative or other governmental action. *Lockwood, supra.*

Rather, as this Court recognized in *Traverse City*, *supra*, 406 the statement quoted by the Court of Appeals is part of the well-accepted principles of construction that the Court must give effect to every word of the Constitution and should avoid any construction that renders words nugatory and meaningless. This is made clear by the context in which the statement was made in *Traverse City*, *supra*, 406, where this Court stated:

> A third rule is that wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does. Chief Justice Marshall pursued this thought fully in *Murbury* v. *Madison* (1803), 5 US (1 Cranch) 137 (2 L Ed 60), which we quote in part:
>
> > If any other construction would render the clause inoperative, this is an additional reason for rejecting such other construction.

Similarly, in *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452

(2003), this Court stated:

> Further, every provision must be interpreted in light of the document as a whole, and no provision should be construed to nullify or impair another. In *re Probert*, 411 Mich 210, 232-233; 308 NW2d 773 (1981).

In *Romano v Auditor General*, 323 Mich 533, 539; 35 NW2d 701 (1949), this Court quoted with approval from *State ex rel. Jameson, v Denny*, 118 Ind 382, 391; 21 NE 252 (1889), stating:

> It is not to be supposed that single word was inserted in the organic law of the State without the intention of conveying thereby some meaning.

The Court of Appeals' and Appellees' construction of the third clause of the third sentence of §9 violate this principle of construction by reading the word "exclusively" right out of the sentence. Such construction limits the purpose of the third clause of the third sentence in §9 to simply capping the amount of general sales tax revenues that can be used for comprehensive transportation to not more than 25%. *Amici curiae* does not dispute that one of the purposes of this clause is to establish such a limit. However, to read this as the sole purpose seriously misconstrues the language for several reasons.

For example, this construction reads the word "exclusively" right out of the provision. If placing a limit on the percentage of general sales tax revenues was the sole purpose of the provision, there would be no need to add the word "exclusively" to the provision. The limitation would be more simply and clearly expressed as "...not more than 25% of the general sales taxes...shall be used for transportation purposes."[1] If the sole purpose of the provision is one of limitation, the addition of the word "exclusively" just adds confusion and ambiguity. For

[1]Actually, from a drafting perspective, such a limitation might be stated more clearly by the use of "may" rather than "shall." For example, "...not more than 25% of the general sales taxes...may be used for transportation purposes..." Or to state the limitation in mandatory language, "...the legislature shall not use more than 25% of the general sales taxes for comprehensive transportation purposes."

example, could more than 25% of the general sales tax revenues be used for comprehensive transportation purposes, so long as such revenues were not used exclusively for such purposes?

To conclude that the sole purpose of this provision is to establish a limit on the amount of general sales tax revenue that can be used for comprehensive transportation purposes makes the word "exclusively" nugatory and meaningless. Both Appellees and the Court of Appeals failed to either acknowledge or address this aspect of their proposed construction.

Fourth, Appellees continue to argue (Brief, page 10) that the third paragraph of §9 "'constitutionally dedicates exclusively for comprehensive transportation purposes as defined by law' three things," but that one of these three things is really nothing (*i.e.*, 0% of general sales tax revenues). *Amici curiae* concur with, but will not repeat, Appellants' arguments (Application, pages 20-26) in this regard. However, Appellees' attempts to distinguish the constitutional treatment of general sales tax revenues from the other revenues addressed in the third sentence of §9 are without merit.

For example, Appellees recognize that the third sentence of §9 dedicates the balance of specific taxes on motor vehicle fuel to comprehensive transportation purposes. However, none of the arguments set forth in Appellees' brief distinguish the treatment of: (i) the balance of the specific taxes on motor vehicle fuel; and (ii) general sales tax revenues, with regards to §9's dedication of these revenues to comprehensive transportation purposes. Both require some action by the Legislature to determine the precise percentage to be allocated to comprehensive transportation purposes; and the absence of legislative action may result in none of either such revenues being allocated to comprehensive transportation purposes. In both cases, the Legislature is free to dedicate any amount (up to the constitutional limit) or no amount to comprehensive transportation purposes. In both cases, §9 imposes a percentage limitation on the

amount that can be dedicated to transportation purposes. Although the percentage limitations are expressed in different terms, in both cases the third sentence of §9 clearly sets forth, in precisely the same wording, that the amounts allocated by the Legislature for such purposes shall be used exclusively for comprehensive transportation purposes. Appellees' attempt to distinguish between the treatment of the portions allocated by the Legislature to comprehensive transportation purposes of: (i) specific taxes on motor vehicle fuel; and (ii) general sales taxes, is without merit. Section 9 dedicates both amounts to comprehensive transportation purposes by exactly the same language mandating that both amounts "shall be used exclusively for comprehensive transportation purposes."

Fifth, the Court of Appeals' Opinion, page 6, also errs in ruling that "Only funds governed by self-executing provisions are entitled to the status of 'constitutionally dedicated funds' exempt from the Governor's authority." This conclusion is unsupported and erroneous. No party argued this position to the Court. The Court does not cite any authority for reaching *sua sponte* this conclusion. Even if a constitutional provision is not self-executing (*i.e.*, it requires some legislative action to implement it) the Court should prohibit a state official (*e.g.*, the Governor) from violating its mandatory prohibitions. In *County Road Association of Michigan v Department of Transportation*, 94 Mich App 242; 288 NW2d 382 (1979), the Court of Appeals issued a writ of mandamus prohibiting the executive branch from expending funds from the State Trunkline Fund and the Comprehensive Transportation Fund for a vehicle testing program. The Court of Appeals ruled that the vehicle testing program was not a comprehensive transportation purpose for which such §9 revenues could be used. The ruling in the instant case that only funds governed by self-executing constitutional provisions are protected by §9 is unsupported and contrary to the Court of Appeals' previous ruling in *County Road, supra.*

Such reasoning is also inconsistent with the terms of §9. The fourth sentence of §9 expressly recognizes that §9 not only "allocate[s]" itself tax revenues to transportation purposes but also "authorize[s] [the Legislature to quantify revenues] to be allocated by this section." Once the revenues are so allocated, regardless of whether by §9 itself, or by the Legislature pursuant to §9, the consequences with regards to the governor's authority to shift them over to the general fund is the same.

Sixth, a*mici curiae* believe that the proper resolution of the issue in this case is also advanced by considering the procedural alternatives of the positions advocated. When the state faces a budget deficient, action must be taken to balance the budget. Except for funds that are constitutionally dedicated, the Const 1963, art 5, §20 authorizes the Governor to reduce appropriations to balance the budget. Under §20, such decisions must be made with the approval of the appropriation committees of both the House and Senate.

In contrast, since §9 funds are not subject to reduction pursuant to §20, any reallocation of such funds must be made by legislative enactment, requiring among other things, approval of a majority of the members of each house of the legislature. Such action has been taken in the past. See 1991 PA 70. Thus, the fact that general sales tax revenue allocated by the Legislator to comprehensive transportation revenues are protected by §9 does not mean that such revenues can never be used to address a fiscal situation. It means only that shifting such motor vehicle tax revenues (even if collected via the sales tax, rather than a specific tax) away from transportation purposes requires a higher level of legislative approval. This is consistent with the principle that motor vehicle tax revenues are paid by those using the state's transportation infrastructure and should be used primarily to cover the cost thereof. The Court of Appeals decision to treat revenues from the sales tax on motor vehicles the same as any other sales tax revenues in this

regard is inconsistent with the language and purpose of Const 1963, art 9, §9.

Seventh, it should be noted that the decision in this case impacts not only the procedures to be used to respond to fiscal situations, but also impacts the cost of funding for transportation purposes. As referenced in the final sentence of §9, the taxes allocated, or authorized to be allocated, by §9 may be pledged for financing purposes. To the extent that such revenues are not subject to reallocation to the general fund pursuant to Article 5, §20, financing secured by the pledging of such revenues will be available at a lower cost. This is an additional reason to enforce the plain meaning of the provisions of §9 and reverse the Court of Appeals decision.

For all the reasons discussed in Appellant's Brief and above, the Court of Appeals decision is clearly erroneous and should be reversed.

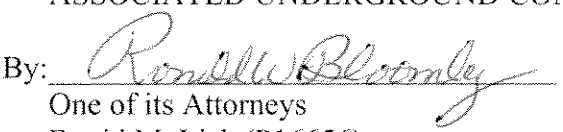
IV. RELIEF REQUESTED

For the reasons expressed above, *Amici Curiae* Michigan Road Builders Association and Associated Underground Contractors conclude that the Court of Appeals decision was erroneous and should be reversed and that the preliminary injunction was correctly issued and should be affirmed.

Respectfully submitted,

Amici Curiae
MICHIGAN ROAD BUILDERS ASSOCIATION
ASSOCIATED UNDERGROUND CONTRACTORS

Dated: October 25, 2004

By: 

One of its Attorneys
David M. Lick (P16656)
Jeffrey W. Bracken (25648)
Ronald W. Bloomberg(P30011)
LOOMIS, EWERT, PARSLEY,
DAVIS & GOTTING, P.C.
232 South Capitol Avenue, Suite 1000
Lansing, Michigan 48933-1525
(517) 482-2400